Submission to Senate

Inquiry into Liquidators and Administrators

Prepared by Duncan Ross

1 Introduction

The purpose of this Submission is to highlight the failure of the regulatory system with respect to unethical behaviour of company Administrators.

To illustrate this failure I will outline a recent personal experience. This relates to a situation where despite serious conflicts of interest an administrator took on the administration of a company that he had previously claimed was in competition to a company in which he was both a major shareholder and director.

Furthermore, at the time of taking on the administration the administrator was also filing affidavits in the Supreme Court seeking an injunction preventing former employees working for the very company he claimed was a competitor to the business he was to be administrator for.

1.1 Background

This submission is in respect to the actions of (...) , (...) (...) insolvency practice.

(...) is also a private investor in businesses.

In early 2005 (...) invested in a technology company called (...) and became a major shareholder and director of that company. I (Duncan Ross) was CEO of (...) during 2005 and 2006. The company provided electronic program guide data in respect to upcoming televisions shows.

Due to a lack of funds my role in (...) was terminated in October 2006 as was that of the Chief Technical Officer, (...) . (...) was a Director of (...) at that time.

On leaving (...) and I established a consultancy practice called ' (...) (...) where we offered out expertise in the media technology business.

One of our clients was (...) , an ASX listed public company. (...) approached me after I left (...) and asked me to do some technology consulting work for them.

(...) was at that time applying for government technology grants along with engineering a device for (...) which would allow customers to play new release videos they had downloaded at the local video store onto memory devices (such as iPods).

My firm, (...) carried out a number of consultancy projects for (...) during late 2006 and early 2007. In early 2007 the Managing Director of (...) offered (...) (...) and I permanent positions with the company as (...) respectively.

(...) was in a difficult financial position and the project with (...) was behind both budget and schedule. Between February 2007 and July 2007 I worked with (...) to bring that development back on track including attracting several million dollars in critical investment capital and essential technology from a well respected Korean company.

In February 2007 (...) in his role as a (...) instituted legal proceedings against myself and (...) claiming that we breached employment agreements with (...) by working for (...)

(...) was so convinced that (...) was a competitor of (...) that he petitioned the Supreme Court of Australia to place an urgent injunction on (...) to not work for (...) The Supreme Court agreed with (...) and granted the injunction. This prevented (...) from working for (...) for 3 months, the expiry of our restraint of trade contract with (...)

In keeping with the injunction we immediately stopped working for (...) was unable to complete the rescue plan we proposed, frustrated by the removal of (...) and my involvement, and a secured creditor appointed an administrator.

The secured creditor appointed none other than (...) and his firm (...) who accepted the position despite obvious conflicts.

This appointment was within weeks of the company (...) was a major shareholder and director of (...) successfully being granted an injunction by the Supreme Court preventing (...) working for (...) because (...) claimed (...) was a competitor of (...)

(...) and his partner (...) rejected all claims of serious conflict of interest from both (...) and others who attended the creditor meetings. (...) himself chaired the first creditors meeting.

During the first creditor meeting I was elected to the creditors committee. However, when the minutes came out a different person was said to have been elected. This was pointed out to (...) (...) and (...) in person and in writing by others present at the meeting. Either (...) or (...) did not accurately take minutes of the meeting or knowingly falsified them.

(...) and (...) also rejected all advances from (...) and I to complete the work we were doing for (...) which we believe would have seen the company saved and creditors, customers and shareholders spared the destruction of value. In fact, the outcome with the proposed strategic investor and technology partner in place was hugely beneficial to (...)

Just prior to the administration I had negotiated a 'Letter of Intent' with the enthusiastic Korean technology and investment partner and was working on the terms of their investment. I had visited senior executives of this company at their headquarters in Korea and met with local representative in Australia.

However, at no time during the administration did (...) or (...) seek my input into completing the alliance with the proposed Korean partner and investor despite the fact that I was intimately involved in the business working closely with the Managing Director, (...) (...) When I did offer help to (...) he reminded me that I was still restricted by the Supreme Court injunction preventing me from working for (...)

Subsequently (...) successfully had the injunction overturned. That matter is still before the courts.

As a direct result of the actions of (...) is no longer trading in the media business and creditors have received only cents in the dollar. Shareholders have had their value destroyed and employees lost their jobs. (...) never got the innovative new service they wanted and the Australia public was deprived of clever new technology.

And, very conveniently for (...) company (...) a 'competitor' (claimed on affidavit in proceedings against (...) and expressed during cross examination of (...)) was removed from the market and, (...) firm also earned hundreds of thousands of dollars in fees from the administration of (...)

In order to illustrate the clear conflict of interest (...) was under, I have attached a diagram titled 'Relationship Between Entities" with the obvious conflict lines being highlighted.

2 ASIC Performance

I contacted ASIC in late 2008 and complained about the behaviour of (...) and his firm (...) . After hearing nothing from ASIC for some weeks I contacted them by phone. They advised me that my complaint had been 'lost in the system' and they asked that I re-lodge it which I did. That complaint was officially registered on the 2nd March 2009 with reference number 4414799.

I provided ASIC with a number of documents in respect to the conflict of interest of (...) (...) litigation between (...) and myself illustrating the conflict, correspondence on the falsification of minutes of creditor meetings along with material relating to the DOCA which was ultimately entered into by (...)

ASIC advised me on the 20th April 2008 that they would not act further on my complaint about Mr (...) They also advised that they do not give reasons for refusing to act and ultimately referred me to a manager in Melbourne, a (...) would also not elaborate on the reasons for not pursing (...)

Apart from ASICs refusal to investigate the claims against (...) I understand that ASIC is the only mechanism for a case like this to be referred for disciplinary action to the Company Auditors and Liquidators Disciplinary Board (CALDB). I was advised by ASIC that they would not be refering (...) to the board.

General comments from speaking with a number of ASIC staff over a period of some months gave me the impression that they were very selective about chosing their battles. This appears to me to be more about taking public scalps rather than enforcing the law.

ASIC also advised me on a number of occasions that I could pursue the matter against (...) (...) personally through the courts and that creditors involved in the administration also had the right to challenge the administrator. While technically this is correct, it is morally wrong and offensive for two reasons:

- It is not the job of creditors to enforce professional industry standards. That is why we have regulators. Regulators cannot give Administrators and Liquidators special powers and protection then stand back and insist that compliance is enforced through private litigation.
- Creditors in situations of administration rarely act against the administrator because they generally have already lost money and it's a case of throwing good money after bad. Rarely does anyone have the money to institute costly and lengthy litigation through the courts. Unscrupulous administrators rely on this and act accordingly.

ASICs decision to neither investigate or refer this matter to CALDB close off the only 2 effective mechanisms to review (...) unprofessional and potentially illegal behaviour.

Considering the case outlined above, (...) had significant conflict that he chose to conceal. Instead he claims that the following statement made to creditors absolves him of his responsibility of disclosure:

> *"We have not previously acted for the company or the company's officers in any capacity prior to our appointment as Administrators of the company."*
>
> *"Creditors should note however that a company, (...) of which I am a shareholder and director has had previous negotiations with the company regarding the supply of products. No financial dealings have occurred in this regard."*

(...) omitted to mention:

- He stated in affidavit that (...) was a competitor to (...)
- He'd sought and received urgent injunctions in the Supreme Court to prevent ex (...) staff from working for (...) because he claimed Mobilesoft was a competitor.
- (...) which (...) was a director of at the time of the administration had a strategic marketing alliance with (...) a company that was both a competitor of (...) and in litigation with (...)
- (...) and (...) had a commercial relationship. (...) was a paying customer of (...)
- (...) was also in commercial negotiations with (...) – they were discussing potential acquisition of (...) by (...) and had negotiated a supply agreement.

These and many more conflicts were objected to in writing by creditors. However (...) chose to ignore these and continue with the administration of (...) which saw investor, creditor and employee value destroyed, and a 'competitor' of (...) company no longer trading in the 'competitive' media industry.

Despite recourse to the courts, (...) and other Administrators get away with this sort of behaviour because stakeholders are neither well enough informed, coordinated, resourced or interested in throwing "good money after bad". The result is unnecessary destruction of investor and creditor value, and more importantly, loss of confidence in the regulatory system.

To recap, in July 2007, (...) , the company in which (...) is second largest shareholder, obtains an injunction stopping two ex-employees working for (...) He argues that (...) was so competitive with (...) that an urgent injunction was essential to prevent irreparable damage to (...) In August 2007 (...) is appointed Administrator of (...) denying any conflict that might prevent this.

I understand that ASIC cannot prosecute every complaint. However in this case we provided compelling written evidence of our grievance. Furthermore, (...) had been found to have acted unprofessionally in other court proceedings (...) (...) one of the partners in his practice, who had been an administrator of a company whose assets were acquired by (...) in 2005, had been de-registered by ASIC in May 2007.

Given that ASIC chose not to prosecute this blatant case, what exactly does an administrator have to do to be investigated and sanctioned for unprofessional or illegal behaviour?

What is the relevance of organisations such as ASIC and CALDB when cases of such blatant behaviour goes unchecked – in fact rewarded by arguably excessive professional fees?

3 Recommendations

In addition to ethical failures, administrators also fail to achieve the commercial objectives due to incompetence. To ensure the best outcome for all stakeholders involved in business failures I believe there needs to be two key characteristics of the appointed administrator:

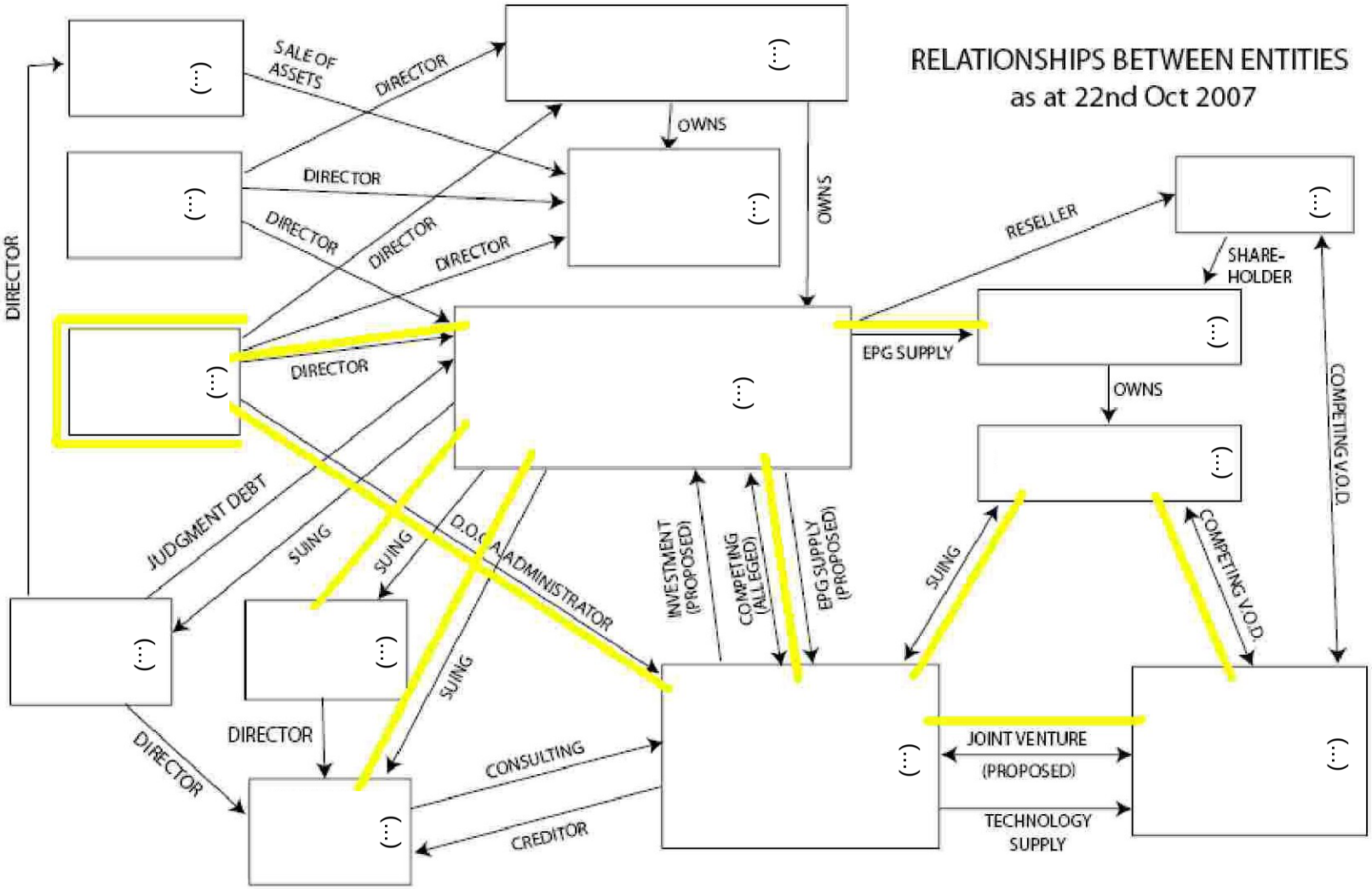
- Commercial Expertise in the appointee company field of endeavour
- Independence / Absence of conflict.

I therefore propose the following:

1. Establishment of an Ombudsman for Administrators and Liquidators, with the obligation to respond to every complaint and to publish reasons for deciding not to investigate.
2. Obligation on ASIC to at least investigate and report on all identified breaches of law or professional protocol rather than just seeking high media profile scalps.
3. Regulations ensuring that Administrators and Liquidators have appropriate commercial skills and experience applicable to the businesses they undertake administrations or liquidations on.
4. Ability for any person or alternatively any qualified accountant to refer an Administrator or Liquidator to the CALDB.
5. Clarification of the roles of ASIC and CALDB in respect to investigating, prosecuting or sanctioning wayward Administrator or Liquidator.

---------- end of submission ----------

Duncan Ross
(...)


RELATIONSHIPS BETWEEN ENTITIES
as at 22nd Oct 2007
SALE OF ASSETS
DIRECTOR
OWNS
DIRECTOR
DIRECTOR
DIRECTOR
DIRECTOR
DIRECTOR
DIRECTOR
RESELLER
SHARE-HOLDER
EPG SUPPLY
OWNS
COMPETING V.O.D.
JUDGMENT DEBT
SUING
SUING
D.O.C.A.
ADMINISTRATOR
INVESTMENT (PROPOSED)
COMPETING (ALLEGED)
EPG SUPPLY (PROPOSED)
SUING
COMPETING V.O.D.
DIRECTOR
DIRECTOR
SUING
CONSULTING
CREDITOR
JOINT VENTURE
(PROPOSED)
TECHNOLOGY SUPPLY